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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 12 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an export business. It seeks to employ the beneficiary permanently in the United States as a "manager, customer technical services" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job offered did not require an alien of exceptional ability. The director declined to address whether or not the petitioner demonstrated that the beneficiary is an alien of exceptional ability.

On appeal, counsel asserts that the wage offered is sufficient to demonstrate that the job requires an alien of exceptional ability. For the reasons discussed below, we uphold the director's decision. We further find that the petitioner has not established that the alien qualifies as an alien of exceptional ability. Specifically, the petitioner only submitted the required initial evidence relating to two of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), of which an alien must meet at least three, and even the evidence relating to those two criteria has not been demonstrated to meet the regulatory standard for aliens of exceptional ability, a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

JOB REQUIREMENTS

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

> alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The certified Form ETA 750 indicates that no education and two years of experience in the job offered are the sole job requirements. Box 15 explicitly provides that the job requires no "other special requirements." Based on this information, the director concluded that the job did not require an alien of exceptional ability.

In response to the director's request for evidence that the beneficiary is an alien of exceptional ability, the petitioner's vice president asserted that the beneficiary's salary was "commensurate with top management positions in our field." On appeal, counsel notes that Box 12 indicates that the basic rate of pay offered is $52.99 per hour, or $110,219.20 annually. Counsel concludes that offering a wage of "more than one hundred thousand dollars per year is demonstrated 'comparable evidence' of exceptional ability."

We will address whether the petitioner himself is exceptional below. At issue in this section is whether the job requirements suggest that the position itself requires an alien of exceptional ability. The requirements for exceptional ability are set forth at 8 C.F.R. § 204.5(k)(3)(ii). Those requirements, which will be discussed in more detail below, include a degree or diploma, 10 years of experience in the occupation, a license to practice the profession or occupation, a salary consistent with exceptional ability, professional memberships and recognition for achievements. An alien must meet at least three of the regulatory requirements to qualify as an alien of exceptional ability. As noted by counsel, the regulation at 8 C.F.R. § 204.5(k)(3)(iii) permits the petitioner to submit "comparable evidence" of exceptional ability, but only if "the above standards do not readily apply to the beneficiary's occupation." The regulation at 8 C.F.R. § 204.5(k)(3)(iii) does not suggest that submitting *one* type of "comparable evidence" can substitute for meeting *three* criteria.

The criterion set forth in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires evidence "that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability." Pursuant to the regulation at 8 C.F.R. § 204.5(k)(2), the regulatory standard for exceptional ability is a "degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Thus, a salary indicative of exceptional ability, or a degree of expertise significantly above that ordinarily encountered in the beneficiary's field of business is not "comparable evidence" of exceptional ability, but simply one of the regulatory criteria, of which an alien of exceptional ability must meet at least three.

First, the petitioner has not demonstrated that the proffered wage is indicative of a degree of expertise significantly above that ordinarily encountered in the field of business. The petitioner did not submit evidence of the range of wages in the beneficiary's occupation, customer technical

services manager. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Thus, the petitioner has not established that the proffered wage, $110,219.20, exceeds the prevailing wage for a customer technical services manager such that it is indicative of a degree of expertise above that ordinarily encountered in the field.

Even if the petitioner had demonstrated that the proffered wage was indicative of a degree of expertise significantly above that ordinarily encountered in the field, a salary demonstrating exceptional ability is merely one of the regulatory criteria, of which an alien of exceptional ability must meet at least three. The job offer as specified on the Form ETA 750 does not require a degree, at least 10 years of experience, a license or professional memberships, the other regulatory criteria that are amenable to inclusion on the Form ETA 750. 8 C.F.R. § 204.5(k)(3)(ii)(A),(B),(C),(E). Thus, we concur with the director that the petitioner has not established that the job requires an alien of exceptional ability as required under 8 C.F.R. § 204.5(k)(4)(i).

ELIGIBILITY FOR THE CLASSIFICATION SOUGHT

The director did not reach the issue of whether the beneficiary is an alien of exceptional ability. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO, however, even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For the reasons discussed below, we find that the petitioner has not established that the beneficiary is an alien of exceptional ability, defined at 8 C.F.R. § 204.5(k)(2), through the submission of evidence pursuant to 8 C.F.R. § 204.5(k)(3)(ii).

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].[2] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)[(5)] determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)]. If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)[(5)] determinations.

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[2] As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984).

As stated above, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below. Moreover, the petitioner must establish the beneficiary's eligibility as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The priority date is the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 28, 2002.

As also stated above, the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The criteria follow.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's education is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner submitted the required initial evidence relating to this criterion, the beneficiary's certificates and degrees. Specifically, the petitioner submitted the beneficiary's certificates for completion of (1) an Introduction to the Quality Improvement Process Workshop offered by AT&T, (2) a System 75 and EBS Sales Training course and coursework and (3) examinations at the Information Bureau International Academy Unit in Dacca. The petitioner also submitted the beneficiary's Bachelor of Arts Degree issued by the University of Dacca. The petitioner did not submit an evaluation of this credential.

As discussed above, the Department of Labor certified the ETA 750 indicating that no education was required for the job. While no education may be required for the position, it is the petitioner's burden to demonstrate that the beneficiary's baccalaureate, which has not been evaluated as equivalent to a U.S. baccalaureate, and other training is significantly above that ordinarily encountered in the field. If a baccalaureate is not required but common for customer technical services managers, then the beneficiary's degree does not indicate that he enjoys a degree of

expertise significantly above that ordinarily encountered in the field. Without data from DOL or a comparable source indicating the type of education common for customer technical services managers, we cannot evaluate whether the beneficiary's degree and other training can serve to meet this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

On the Form ETA 750B, the beneficiary indicated that he had worked as a customer technical services manager for AT&T / Western Electric Saudi Arabia (WESA) from January 1991 through October 1997, for Unsworth Transport International in New Jersey from January 2000 through June 2001 and for the petitioner since June 2001. In response to the director's request for additional evidence, counsel asserted that the beneficiary had more than 15 years of experience in the occupation offered. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Regl. Commr. 1972)). Moreover, as stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. The regulation at 8 C.F.R. § 204.5(k)(3)(iii)(B) expressly requires letters from current or former employers documenting at least ten years of employment in the relevant occupation.

Initially, the petitioner submitted the approval notices for nonimmigrant visa petitions in the beneficiary's behalf filed by the petitioner in November 2005, September 2002 and January 2001 and filed by Unsworth Transport in January 2000. In response to the director's request for additional evidence, the petitioner submitted a letter from its vice president confirming the beneficiary's employment there as a customer technical services manager since January 2001, which confirms less than one and a half year's employment in the occupation as of the petition's priority date, May 28, 2002.

The petitioner did not submit any letters from Unsworth Transport confirming the beneficiary's employment there. The petitioner submitted a letter from [redacted] Director of Sales and Marketing at Abdullah Said Bugshan & Bros., dated October 29, 1994 and addressed to a manager at WESA, expressing appreciation for the beneficiary's assistance in acquiring an MDF cabinet. This letter is not from WESA and does not confirm the beneficiary's length of employment or position at WESA. The petitioner also submitted a June 20, 1992 letter of appreciation and recommendation from the Director of Marketing, Sales and Regional Activities at WESA addressed to the beneficiary. The letter notes the completion of the author's three years of service with WESA and the beneficiary's department and the beneficiary's contributions to the company's sales goals, but does not provide the beneficiary's exact dates of employment or job title or duties. Finally, the petitioner submitted a January 31, 1992 letter from the Managing Director of WESA recommending the beneficiary for a merit award. Once again, the letter does not provide the date of the beneficiary's employment with WESA. The petitioner resubmits these documents on appeal.

As of the priority date in this matter, May 28, 2002, the petitioner has established that the beneficiary had one year and five months of experience in the relevant occupation, customer technical services manager. The petitioner has not provided the required initial evidence to demonstrate the beneficiary's experience at Unsworth Transport or WESA in the relevant occupation. Thus, the petitioner has not established that the beneficiary has the required 10 years experience as a customer technical services manager.

In light of the above, the petitioner has not established, by submitting the required initial evidence, that the beneficiary has the necessary experience to meet this criterion.

A license to practice the profession or certification for a particular profession or occupation

Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Regardless, the record contains no evidence that the beneficiary has a license for his profession or occupation.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

As stated above, the petitioner's vice president asserts, in a letter dated June 23, 2006, that the beneficiary's salary "is" $110,219 and that this salary "is commensurate with top management positions in our field." As stated above, the petitioner must establish that the beneficiary qualified as an alien of exceptional ability as of the priority date in this matter, May 28, 2002. Initially, the petitioner submitted the beneficiary's Form W-2 Wage and Tax Statement for 2005 showing wages of $72,850. The petitioner did not submit evidence of the beneficiary's salary prior to May 28, 2002 or evidence that $72,850 is indicative of a degree of expertise significantly above that ordinarily encountered in the field. Thus, the petitioner did not submit the required initial evidence for this criterion that predates the priority date in this matter and, thus, has not established that the beneficiary meets this criterion.

Evidence of membership in professional associations

As the criteria are designed to demonstrate the alien's exceptional ability, we interpret the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) as requiring evidence of the alien's membership in professional associations. In response to the director's request for additional evidence, the petitioner submitted evidence that the *petitioner* is a member of the China Global Logistics Network (CGLN) and that the beneficiary is one of two named contacts for the petitioner on its CGLN Internet listing. The petitioner submitted no evidence that CGLN admits individuals as members or that membership is indicative of a degree of expertise significantly above that ordinarily encountered in the profession. Thus, the petitioner has not submitted the initial required evidence relating to this criterion, evidence of the *beneficiary's* memberships in professional associations and, thus, has not established that the beneficiary meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

As stated above, the petitioner submitted a 1992 letter confirming the beneficiary's selection for a merit award from WESA. The letter indicates that the merit award recognized the beneficiary's "dedication and excellent performance for the year 1991." Without more information about WESA's merit awards, we cannot evaluate whether they recognize achievements and significant contributions to the industry or field generally. The petitioner also submitted a 2006 Certificate of Appreciation and a 2005 Employee of the Year Award from the petitioner. These documents from the petitioner postdate the priority date and cannot establish the beneficiary's exceptional ability as of that date.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

In summary, the petitioner has not established that the beneficiary meets any of the regulatory criteria with evidence indicative of a degree of expertise significantly above that ordinarily encountered in the field. Even if we concluded that the beneficiary meets the criteria for which the initial required evidence was submitted, a university baccalaureate degree pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) and formal recognition from a business organization pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), the beneficiary would still only meet two criteria, not the required three.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The denial of this petition does not bar the filing of a new petition on behalf of the beneficiary under section 203(b)(3) of the Act as a skilled worker with more than two years of training and experience.

ORDER: The appeal is dismissed.